

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

RICHARD BRASKETT,  
Plaintiff,  
v.  
CELESTE FENDER and NATHAN  
TOBEY,  
Defendants.

No. 03:11-cv-01078-HU

**MEMORANDUM OPINION AND ORDER  
ON MOTION FOR SUMMARY JUDGMENT**

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HUBEL, Magistrate Judge:

The plaintiff Richard Braskett brings this action under 42 U.S.C. § 1983, for alleged violations of his constitutional rights by the defendants, in connection with events that occurred in April

1 2010. The defendant Celeste Fender is a Detective with the  
2 Portland Police Bureau ("PPB"), and the defendant Nathan Tobey is  
3 a PPB Officer. At the time of the incidents in question, both  
4 Fender and Tobey were assigned to the PPB's Domestic Violence  
5 Reporting Unit ("DVRU"). Braskett's claims in this case involve  
6 the defendants' contacts with Braskett's wife Barbara Braskett  
7 ("Mrs. Braskett"), and the defendants' search of the Brasketts'  
8 residence on April 13, 2010. Braskett asserts a single claim for  
9 relief, alleging the defendants' actions on the date in question  
10 violated Braskett's "right to be free of unreasonable search and  
11 seizure under the Fourth Amendment and 42 USC 1983." Dkt. #27,  
12 Amended Complaint, ¶ 8.

13 The case currently is before the court on the defendants'  
14 Motion for Summary Judgment. Dkt. #30. The defendants argue they  
15 are entitled to judgment as a matter of law on Braskett's claim.  
16 The motion has been briefed fully by the parties, and the court  
17 heard oral argument on the motion on July 9, 2012.

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19 **BACKGROUND FACTS**

20 The following facts are uncontroverted, unless otherwise  
21 noted.

22 Mr. Braskett and Mrs. Braskett jointly purchased their current  
23 residence in Vancouver, Washington, and they both are named on the  
24 title to the property.<sup>1</sup> In April 2010, Mrs. Braskett reported  
25 verbal abuse by Mr. Braskett to a family friend, who is a former  
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27 <sup>1</sup> Declaration of Jennifer Johnston ("Johnston Decl."), Ex. 2,  
28 Deposition of Barbara Braskett, ("B. Braskett Depo.") 48:14-19.

1 PPB reserve police officer.<sup>2</sup> On or around April 12 or 13, 2010,  
2 Mrs. Braskett asked Mr. Braskett to move out of the family home.  
3 Mrs. Braskett remained in the house with their two children.<sup>3</sup>

4 On the night of Monday, April 12, 2010, Detective Celeste  
5 Fender and Officer Nathan Tobey went to the Braskett residence to  
6 investigate an allegation of domestic violence and prescription  
7 drug abuse by Mr. Braskett.<sup>4</sup> Detective Fender attempted to call  
8 the Braskett residence phone and knocked on the door on numerous  
9 occasions, but there was no answer to either.<sup>5</sup>

10 On Tuesday, April 13, 2010, Fender and Tobey returned to the  
11 Braskett residence to make contact with Mrs. Braskett. They  
12 identified themselves as PPB officers and members of the DVRU,  
13 stating they were there to talk to Mrs. Braskett about her husband,  
14 Mr. Braskett, and to make sure that Mrs. Braskett and the children  
15 were okay.<sup>6</sup>

16 Mrs. Braskett invited Fender and Tobey into her home, and they  
17 talked at the kitchen table.<sup>7</sup> At the time of inviting Fender and  
18 Tobey into the Braskett residence, Mrs. Braskett was aware that one

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20 <sup>2</sup> Ex. 2, B. Braskett Depo. 18:9-19:9.

21 <sup>3</sup> Johnston Decl. Ex. 1, Deposition of Richard Braskett, ("R.  
22 Braskett Depo.") 31:19-23; Ex. 2, B. Braskett Depo. 69:20-70:24.

23 <sup>4</sup> Memo in Supp. of Defs.' Motion Summ. J., at 2.

24 <sup>5</sup> Johnston Decl. Ex. 3, Deposition of Celeste Fender Volumes  
25 I and II ("Ex. 3, Fender Depo.") 34:18-35:8.

26 <sup>6</sup> Ex. 2, B. Braskett Depo. 77:4-22; Ex. 3, Fender Depo. 57:22-  
27 58-5; Johnston Decl. Ex. 4, Deposition of Nathan Tobey, ("Tobey  
28 Depo.") 4:14-18; 6:16-19.

<sup>7</sup> Ex. 2, B. Braskett Depo. 77:18-79:6; Ex. 3, Fender Depo.  
58:5-7.

1 of the subjects about which the officers wanted to talk to her was  
2 Mr. Braskett's use of alcohol and other drugs.<sup>8</sup>

3 They talked, at the kitchen table, about the safety of  
4 Mrs. Braskett and the children, and about giving Mr. Braskett any  
5 assistance that he might need.<sup>9</sup> Mrs. Braskett was relieved to talk  
6 to somebody from the PPB.<sup>10</sup> She talked about the stress which both  
7 she and her husband were under. Mr. Braskett's stress stemmed from  
8 an incident which happened a few years ago.<sup>11</sup> Mrs. Braskett was  
9 concerned that this stress was causing Mr. Braskett to overuse  
10 prescription medication.

11 Both Mrs. Braskett and Mr. Braskett had prescriptions for  
12 painkiller medication.<sup>12</sup> Mrs. Braskett thought Mr. Braskett's  
13 doctor was prescribing excessive amounts of medication, and when  
14 Mr. Braskett's medication ran out, he would take Mrs. Braskett's  
15 medication. Mrs. Braskett was also concerned that Mr. Braskett was  
16 consuming more alcohol than usual, and he had become verbally  
17 abusive towards her.<sup>13</sup> Mrs. Braskett began hiding her medication  
18 from Mr. Braskett so that he could not take hers.<sup>14</sup>

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20 <sup>8</sup> Ex. 2, B. Braskett Depo. 18:2-19:4.

21 <sup>9</sup> Ex. 2, B. Braskett Depo. 79:7-15.

22 <sup>10</sup> Ex. 2, B. Braskett Depo. 127:8-15; 130:8-19; Ex. 4, Tobey  
23 Depo. 19:2-3.

24 <sup>11</sup> Ex. 4, Tobey Depo. 18:4-8.

25 <sup>12</sup> Ex. 4, Tobey Depo. 18:18-19.

26 <sup>13</sup> Ex. 2, B. Braskett Depo. 79:22-80:14; Ex. 3, Fender Depo.  
27 68:7-11; Ex. 4, Tobey Depo. 18:10-11.

28 <sup>14</sup> Ex. 2, B. Braskett Depo. 89:14-19; Ex. 4, Tobey Depo. 18:18-  
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1 Mrs. Braskett clearly stated that while Mr. Braskett had  
 2 become increasingly verbally abusive towards her, he had never been  
 3 physically violent towards her or the children.<sup>15</sup> Mrs. Braskett  
 4 said the situation had been causing her stress, and she had been  
 5 seeking help for some time.<sup>16</sup>

6 In April 2010, Mrs. Braskett was teaching the fourth grade,  
 7 and one of her students had thrown a chair at her, which caused her  
 8 additional stress.<sup>17</sup> Mrs. Braskett told Fender and Tobey about the  
 9 incident, and that she was taking sleeping pills as a result of the  
 10 stress it had caused her.<sup>18</sup> Mrs. Braskett also had a painful  
 11 shoulder injury at the time, and so she was taking a pain reliever/  
 12 sleeping agent.<sup>19</sup>

13 Tobey does not recall Mrs. Braskett talking about incidents in  
 14 her classroom, but does recall Mrs. Braskett informing the officers  
 15 that she had taken sleeping pills the night before, and that was  
 16 why she had not answered the door.<sup>20</sup>

17 Mrs. Braskett recalls Fender and Tobey specifically asking  
 18 whether there were any firearms in the house.<sup>21</sup> Mrs. Braskett  
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20 <sup>15</sup> Ex. 2, B. Braskett Depo. 79:16-21; Ex. 3, Fender Depo.  
 21 61:21-62:1; Ex. 4, Tobey Depo. 8:10-13.

22 <sup>16</sup> Ex. 2, B. Braskett Depo. 82:14-20; Ex. 4, Tobey Depo. 18:23-  
 19:3.

23 <sup>17</sup> Ex. 2, B. Braskett Depo. 33:4-20.

24 <sup>18</sup> Declaration of Kevin Keaney ("Keaney Decl.") Ex. 1, B.  
 25 Braskett Depo., ECF p. 38.

26 <sup>19</sup> Keaney Decl., Ex. 1, B. Braskett Depo. ECF p. 40.

27 <sup>20</sup> Ex. 4, Tobey Depo. 19:4-17.

28 <sup>21</sup> Ex. 2, B. Braskett Depo. 95:16-96:23.

1 communicated her concerns about Mr. Braskett's firearms around the  
2 house, as their children might be able to access them, and she  
3 asked Fender and Tobey to secure the firearms.<sup>22</sup> Mrs. Braskett led  
4 Fender and Tobey to the master bedroom, informed Fender and Tobey  
5 that Mr. Braskett kept a gun in the dresser, and asked them to  
6 remove the gun. Tobey removed the gun.<sup>23</sup> Tobey assumed that  
7 Mrs. Braskett had access to the dresser.<sup>24</sup> Mrs. Braskett allowed  
8 Tobey to unload the ammunition from the gun.<sup>25</sup> Fender did not enter  
9 the dresser to remove the gun, and did not touch the gun at any  
10 stage.<sup>26</sup>

11 Mrs. Braskett did not want the gun in the house, so she opened  
12 a combination lock gun safe in the garage. Officer Tobey placed  
13 the gun in the gun safe at Mrs. Braskett's request.<sup>27</sup>

14 Mrs. Braskett was concerned about the light on the front porch  
15 not working, so Fender and Tobey went to a nearby store and pur-  
16 chased a new light bulb. Tobey installed the new light bulb.<sup>28</sup>

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19 <sup>22</sup> Ex. 3, Fender Depo. 72:13-16; 75:20-22.

20 <sup>23</sup> Ex. 2, B. Braskett Depo. 97:7-13; Ex. 4, Tobey Depo. 23:20-  
21 24:5.

22 <sup>24</sup> Ex. 4, Tobey Depo. 27:8-28:6.

23 <sup>25</sup> Ex. 2, B. Braskett Depo. 97:11-16; 156:10-12; Ex. 3, Fender  
24 Depo. 73:1-4.

25 <sup>26</sup> Declaration of Celeste Fender ¶3 ("Fender Decl."); Ex. 3,  
26 Fender Depo. 72:12-21; 73:13-20; 79:7-12.

27 <sup>27</sup> Ex. 2, B. Braskett Depo. 97:17-98:2; Ex. 3, Fender Depo.  
28 73:13-15; Ex. 4, Tobey Depo. 24:13-14.

<sup>28</sup> Keaney Decl. Ex. 1, B. Braskett Depo. 95:2-11; Ex. 4, Tobey  
Depo. 32:10-19.

1 Mrs. Braskett claims she was assured on numerous occasions  
 2 that the information which she imparted to Fender and Tobey would  
 3 remain confidential between the three of them. Mrs. Braskett was  
 4 aware that Fender and Tobey were from the DVRU; however, she  
 5 believed their conversations would remain confidential because  
 6 there was no allegation of physical abuse by Mr. Braskett towards  
 7 Mrs. Braskett or their children.<sup>29</sup> Tobey does not remember  
 8 Mrs. Braskett asking whether their conversation would remain  
 9 confidential.<sup>30</sup>

10 According to Fender, she called Mrs. Braskett on April 14,  
 11 2010, informing her that the PPB wanted to ensure Mr. Braskett had  
 12 his own prescription, and they arranged for Fender and Tobey to go  
 13 to the house after Mrs. Braskett finished work.<sup>31</sup> Mrs. Braskett  
 14 does not recall any such phone call.<sup>32</sup> Fender and Tobey arrived at  
 15 the Braskett residence shortly after 4:00 p.m.<sup>33</sup> When Mrs. Braskett  
 16 arrived home from work with her children, she invited Fender and  
 17 Tobey inside the Braskett residence.<sup>34</sup>

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21 <sup>29</sup> Ex. 2, B. Braskett Depo. 127:16-22; Keaney Decl. Ex. 1, B.  
 22 Braskett Depo. 127:16-129:24 (ECF pp. 33-34).

23 <sup>30</sup> Ex. 4, Tobey Depo. 19:22-24.

24 <sup>31</sup> Ex. 3, Fender Depo. 98:23-99:23.

25 <sup>32</sup> Ex. 2, B. Braskett Depo. 98:22-25.

26 <sup>33</sup> Ex. 3, Fender Depo. 101:5-12; Ex. 4, Tobey Depo. 34:18-22.

27 <sup>34</sup> Ex. 2, B. Braskett Depo. 100:4-5; Ex. 3, Fender Depo. 101:5-  
 28 22; Ex. 4, Tobey Depo. 34:22-24.

1 Mrs. Braskett went upstairs to retrieve one of Mr. Braskett's  
 2 medication bottles.<sup>35</sup> Mrs. Braskett returned upset, and informed  
 3 Fender and Tobey that Mr. Braskett had been in the house during the  
 4 day, and had cleaned up and disposed of some prescription medica-  
 5 tion bottles, even though Mrs. Braskett had asked Mr. Braskett not  
 6 to enter the house.<sup>36</sup>

7 Mrs. Braskett obtained prescription bottles<sup>37</sup> from  
 8 Mr. Braskett's medicine cabinet in the master bathroom and showed  
 9 them to Fender. Fender copied information from the label onto a  
 10 piece of paper, but she did not remove the prescription bottles  
 11 that came from the medicine cabinet from the Braskett residence.<sup>38</sup>  
 12 Mr. Braskett's prescription Vicodin bottle was not in the medicine  
 13 cabinet, and so was not part of the bottles which Mrs. Braskett  
 14 retrieved from that location and showed to Fender.<sup>39</sup> Neither Fender  
 15 nor Tobey entered the master bedroom or en-suite bathroom on  
 16 April 14, 2010.<sup>40</sup>

17 Mrs. Braskett determined that Mr. Braskett had cleaned up  
 18 because she knew one of Mr. Braskett's empty prescription bottles  
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21 <sup>35</sup> Ex. 3 Fender Depo. 102:10-11; Ex. 4 Tobey Depo. 35:3-10.

22 <sup>36</sup> Ex. 3 Fender Depo. 102:14-19; Ex. 4 Tobey Depo. 35:2-10,  
 23 41:8-10.

24 <sup>37</sup> For the purposes of clarity, "prescription bottles" refers  
 25 exclusively to Mr. Braskett's medication bottles.

26 <sup>38</sup> Ex. 2, B. Braskett Depo. 101:8-102-2; 103:16-104:4.

27 <sup>39</sup> Ex. 2, B. Braskett Depo. 106:25-107:2.

28 <sup>40</sup> Ex. 2, B. Braskett Depo. 101:14-24; Declaration of Nathan  
 Tobey ("Tobey Decl.") ¶¶ 3-6; Fender Decl. ¶ 4.



1 had been in the computer room, but was no longer there, and the  
2 wastebasket<sup>41</sup> in the computer room had been emptied.<sup>42</sup>

3 The garbage had been picked up on that day, and either  
4 Mrs. Braskett or her son had brought the garbage can from the  
5 street back to the garage earlier that afternoon.<sup>43</sup> Mrs. Braskett  
6 discovered that there was still something in the garbage can,  
7 either when her son retrieved the garbage can from the street and  
8 Mrs. Braskett closed the lid, when she was retrieving the garbage  
9 can from the street herself she realized there was still garbage  
10 inside the garbage can, or when she realized the wastebasket in the  
11 computer room had been emptied.<sup>44</sup>

12 Mrs. Braskett led Fender and Tobey to the garage to check the  
13 garbage can for medication bottles which had been put in the  
14 garbage can that day.<sup>45</sup> According to Tobey, Mrs. Braskett opened  
15 the lid to the garbage can.<sup>46</sup> Fender does not recall who opened the  
16 garbage can.<sup>47</sup> The garbage can contained a clear plastic garbage  
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18 <sup>41</sup> For the purposes of clarity, "wastebasket" refers  
19 exclusively to the one in the computer room.

20 <sup>42</sup> Ex. 2, B. Braskett Depo. 106:16-24; 159:13-19.

21 <sup>43</sup> For the purposes of clarity, "garbage can" refers exclu-  
22 sively to the household garbage can. (Mrs. Braskett describes it as  
23 a "big blue thing, with a lid on wheels." Ex. 2, B. Braskett Depo.  
102:17.) It is placed at the curb for periodic pickup by the  
garbage service.

24 <sup>44</sup> Ex. 2, B. Braskett Depo. 102:4-21; 104:5-105:24; 106:7-  
25 107:60; 159:13-19.

26 <sup>45</sup> Ex. 4, Tobey Depo. 42:1-6.

27 <sup>46</sup> Ex. 4, Tobey Depo. 35:14-19.

28 <sup>47</sup> Ex. 3, Fender Depo. 103:22-104:1.

1 bag, and one could clearly see that it contained Vicodin bottles.<sup>48</sup>  
 2 Mrs. Braskett said the bag contained what Mr. Braskett had cleaned  
 3 up during the day.<sup>49</sup>

4 Mrs. Braskett offered to get an umbrella with a hook so that  
 5 she could retrieve the garbage bag.<sup>50</sup> Fender did not retrieve the  
 6 bag.<sup>51</sup> Tobey does not remember who removed the bag from the garbage  
 7 can, but believes that Mrs. Braskett opened the garbage bag and  
 8 handed the bottles to Fender.<sup>52</sup> Mrs. Braskett recalls Tobey  
 9 reaching into the garbage can, removing the bag of prescription  
 10 bottles from the garbage can, opening the bag, and removing the  
 11 prescription bottles from the bag.<sup>53</sup>

12 Fender does not recall whether she physically handled the  
 13 bottles at the Braskett residence, but when Fender and Tobey left  
 14 the Braskett residence, they took the empty medication bottles with  
 15 them.<sup>54</sup>

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20 <sup>48</sup> Ex. 2, B. Braskett Depo. 159:21-24; Ex. 3, Fender Depo.  
 21 103:14-21; Ex. 4, Tobey Depo. 35:14-19.

22 <sup>49</sup> Ex. 4, Tobey Depo. 35:18-19.

23 <sup>50</sup> Ex. 2, B. Braskett Depo. 160:4-22.

24 <sup>51</sup> Ex. 3, Fender Depo. 103:24-104:1.

25 <sup>52</sup> Ex. 4, Tobey Depo. 35:14-17; 36:17-22; 42:20-43:3; 49:25-  
 26 50:2.

27 <sup>53</sup> Ex. 2, B. Braskett Depo. 107:12-20; 159:25-160-22.

28 <sup>54</sup> Ex. 3, Fender Depo. 104:9-13.

**SUMMARY JUDGMENT STANDARDS**

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)). The Ninth Circuit Court of Appeals has described "the shifting burden of proof governing motions for summary judgment" as follows:

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S. Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Id.* at 324, 106 S. Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be

1 drawn in its favor. *Id.* at 255, 106 S. Ct.  
2 2505.

3 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th  
4 Cir. 2010).

### 6 ***DISCUSSION***

7 In the Amended Complaint, Braskett brings this 42 U.S.C.  
8 § 1983 claim alleging the defendants breached his Fourth Amendment  
9 rights by entering the Braskett residence without his consent, and  
10 conducting a search without a warrant or exigent circumstances.  
11 Specifically, Braskett contends that in the course of the search,  
12 the defendants violated his Fourth Amendment rights by searching  
13 his medicine cabinet, taking medical records, going through the  
14 garbage, and retrieving a handgun from the dresser.<sup>55</sup> In the face  
15 of the defendants' assertion that Mrs. Braskett consented to the  
16 search, Mr. Braskett contends that, at the time, Mrs. Braskett did  
17 not have the capacity to consent.

18 In addition, the defendants claim that even if Braskett could  
19 show his constitutional rights were violated, the defendants are  
20 entitled to summary judgment because qualified immunity shields  
21 them from liability. The defendants seek summary judgment on all  
22 of Mr. Braskett's claims.

### 24 **Burden of Proving Incapacity**

25 The parties dispute whether the burden of proving  
26 Mrs. Braskett's capacity to consent to a search falls upon the  
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28 <sup>55</sup> Johnston Decl., Ex. 1, R. Braskett Depo. 34:8-15.

1 defendants, as the state actors, or must be carried by  
2 Mr. Braskett, as the civil plaintiff. Mr. Braskett challenges the  
3 officers' reliance on Mrs. Braskett's consent, claiming she was too  
4 tired and too stressed to be able to make a voluntary decision to  
5 consent. He makes this argument with respect to each alleged  
6 constitutional violation.

7 Mr. Braskett alleges the government always has the burden of  
8 proving the existence of consent, citing *United States v. Shaibu*,  
9 920 F.2d 1423, 1426 (9th Cir. 1990).<sup>56</sup> The defendants respond that  
10 *Shaibu* is a criminal case, and is inapplicable to this § 1983  
11 claim.<sup>57</sup> The defendants allege Mr. Braskett carries the burden of  
12 proving lack of consent, citing Ninth Circuit authority.

13 [In] a criminal case, the government bears the  
14 burden of proving by a preponderance of the  
15 evidence that consent was freely and volun-  
16 tarily given. In a civil case under 42 U.S.C.  
1983, however, the plaintiff carries the ulti-  
mate burden of establishing each element of  
his or her claim, including lack of consent.

17 *Pavao v. Pagay*, 307 F.3d 915, 918-19 (9th Cir. 2002).

18 In *Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994), the  
19 plaintiff brought a § 1983 action against police officers for  
20 wrongful detention. Larez was seized by officers and detained for  
21 questioning in connection with a murder investigation in which her  
22 brother was a suspect. Larez claimed she thought she was under  
23 arrest; she was taken to the police station and held, in handcuffs,  
24 for two hours; and she neither consented to be questioned, nor  
25 responded to officers' questions. The officers told a different

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27 <sup>56</sup> Pl.'s Opp'n to Defs.' Mot. Summ. J., at 8.

28 <sup>57</sup> Reply in Supp. of Defs.' Mot. for Summ. J., at 5.

1 story, claiming Larez was cooperative from the beginning; she  
2 consented to being taken to the police station for questioning; and  
3 she never was handcuffed. The court held that while the burden of  
4 producing evidence of consent may be placed on the defendant, the  
5 risk of nonpersuasion remains with the plaintiff, who always has  
6 the burden to prove a violation of the Fourth Amendment. *Larez*, 16  
7 F.3d at 1517 (citing *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d  
8 Cir. 1991)). See also, e.g., *Bogan v. City of Chicago*, 644 F.3d  
9 563, 570 (7th Cir. 2011) (employing a "criminal burden of proof is  
10 contrary to established principles governing civil trials, namely,  
11 that 'the ultimate risk of nonpersuasion must remain squarely on  
12 the plaintiff'" (citations omitted); *Valance v. Wisel*, 110 F.3d  
13 1269, 1279 (7th Cir. 1997) (in a civil case, defendant must offer  
14 evidence to meet or rebut the presumption that a warrantless search  
15 is unreasonable, but plaintiff must prove consent was not given or  
16 was invalid) (citing, *inter alia*, Fed. R. Evid. 301).

17 While *Larez* was a § 1983 case, that court did not consider the  
18 issue of a third party's consent. Having examined the case law  
19 surrounding § 1983 claims, it would appear that the issues arising  
20 in this case are somewhat unique. Neither counsel for the  
21 plaintiff, nor the defendants, has made known to the court any case  
22 which concerned a § 1983 claim alleging a violation of the Fourth  
23 Amendment, where the plaintiff challenged the capacity of a third  
24 party to consent, after the § 1983 defendants relied on that third  
25 party's consent to justify their search. I note the defendants  
26 here plead the consent of Mrs. Braskett as an affirmative defense  
27 to avoid the § 1983 claim of a constitutional violation. See Fed.  
28 R. Civ. P. 8(c)(1) (requiring a party to state a matter of

1 avoidance as an affirmative defense). On these facts, it seems  
2 appropriate that Braskett must prove he did not consent to any  
3 search, but if the defendants want to avoid a constitutional  
4 violation by relying on Mrs. Braskett's consent, they should have  
5 the burden of proving its validity. However, resolution of who has  
6 this burden is not essential in deciding this motion for summary  
7 judgment. To avoid summary judgment, Braskett is required to raise  
8 a material question of fact about the capacity of Mrs. Braskett to  
9 consent to a search of the Braskett residence. I turn to that  
10 issue.

11 "[W]hether a consent to a search was in fact 'voluntary' or  
12 was the product of duress or coercion, express or implied, is a  
13 question of fact to be determined from the totality of all the  
14 circumstances." *United States v. Garcia*, 997 F.2d 1273, 1281-82  
15 (9th Cir. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218,  
16 226-27, 93 S. Ct. 2041, 2047-28, 36 L. Ed. 2d 854 (1973)). Both  
17 parties agree that this holistic standard is the proper test in the  
18 instant case.<sup>58</sup> Braskett claims that all of the factors weighing  
19 upon Mrs. Braskett on the night of April 13, 2010, made her  
20 incapable of consenting. The defendants assert the factors  
21 weighing upon Mrs. Braskett that night were not sufficiently  
22 incapacitating so as to prevent her from consenting to a search of  
23 the Braskett residence.

24 The defendants cite numerous cases concerning the threshold  
25 for a finding of incapacity to consent. The cases set the bar  
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27 <sup>58</sup> Reply in Supp. Defs.' Mot. Summ. J., at 10; Pl.'s Opp'n to  
28 Defs.' Mot. Summ. J., at 8.

1 quite high for a finding of incapacity. In *United States v.*  
2 *George*, 987 F.2d 1428 (9th Cir. 1993), the defendant had overdosed  
3 on heroin, and was questioned by police several hours later, while  
4 he was still in critical condition. The court held the defendant's  
5 consent for officers to search his hotel room was voluntary,  
6 finding his condition "did not render him unconscious or comatose,"  
7 and his consent was not coerced by the police. *George*, 987 F.2d at  
8 1430. Similarly, in *United States v. Martin*, 781 F.2d 671 (9th Cir.  
9 1985), the defendant was questioned by police in the hospital,  
10 while he was under the influence of pain medication. The court  
11 held the defendant's consent to search was voluntary:

12         Martin was awake and relatively coherent  
13         during the questioning at the hospital. . . .  
14         There is no evidence of extended and oppres-  
15         sive questioning. Nor had Martin received  
16         excessive quantities or unusual combinations  
17         of drugs. Martin's injuries, while painful,  
18         did not render him unconscious or comatose.  
19         Moreover, Martin said that he wanted to talk  
20         to the officers and was not reluctant to tell  
21         his story.

22 *Martin*, 781 F.2d at 674.

23         In *United States v. Freyre-Lazero*, 3 F.3d 1496 (11th Cir.  
24 1993), involving a factual situation similar to the one in the case  
25 at hand, the defendant alleged his wife was unable to consent to a  
26 search of the defendant's home because she was emotionally  
27 distraught after having seen her son being arrested earlier that  
28 day. The court affirmed the district court's finding that the wife  
was capable of consenting, noting she had a "rational demeanor,"  
and although she had witnessed her son's arrest, "both detectives  
testified that she was not too distraught to comprehend the  
implications of the search." *Freyre-Lazero*, 3 F.3d at 1501. See



1 also *United States v. Mancias*, 350 F.3d 800, 805-06 (8th Cir. 2003)  
2 (defendant's extreme fatigue did not render his consent  
3 involuntary); *United States v. Duran*, 957 F.2d 499, 503 (7th Cir.  
4 1992) ("[T]he fact that a consenting party is extremely upset at  
5 the time she consents is not dispositive. . . . [A]bsent a showing  
6 that her emotional distress was so profound as to impair her  
7 capacity for self-determination or understanding of what the police  
8 were seeking, it is not enough to tip the balance towards finding  
9 that her consent was involuntary.").

10 Examining all of the factors in the instant case, the record  
11 does not reflect circumstances or factors which caused  
12 Mrs. Braskett to be incapable of consenting. In April 2010,  
13 Mrs. Braskett was an elementary school teacher, and was capable of  
14 attending work, driving her car, and caring for her children.<sup>59</sup> She  
15 expressed concerns about her husband's alleged use of alcohol and  
16 other drugs, and other stressors in their lives. When asked  
17 whether there were any guns in the house, Mrs. Braskett not only  
18 recalled that there was a gun and its location, she led the  
19 defendants to the gun, and asked them to unload it and to place it  
20 in the gun safe. She then took the defendants to the garage and  
21 unlocked the gun safe. These are not the actions of an incoherent  
22 or markedly impaired individual. They raise no issue about her  
23 capacity to consent.

24 There is no evidence here of extended or oppressive  
25 questioning. Other evidence shows Mrs. Braskett was capable of  
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27 <sup>59</sup> Ex. 2, B. Braskett Depo. 70:21-22; Ex. 3, Fender Depo.  
28 101:11-22.

1 rational decision-making. She told the officers she had taken  
2 Tylenol PM, a painkiller with a sleeping agent, because she did not  
3 want to mix Motrin, which she was taking for her injured shoulder,  
4 with a regular sleeping agent.<sup>60</sup> I find that while Mrs. Braskett  
5 had a painful shoulder injury at the time, and was under some  
6 degree of stress due to other events in her life, no reasonable  
7 juror could find, on these facts, that Mrs. Braskett did not  
8 voluntarily consent to the "searches," given the standards for that  
9 analysis in the Ninth Circuit. Regardless of who has the burden of  
10 persuasion on the issue of Mrs. Braskett's capacity to consent,  
11 Mr. Braskett has not shown the existence of a material issue of  
12 fact in that regard.

#### 14 **Ruse**

15 Mr. Braskett further alleges that Fender and Tobey obtained  
16 entry into the Braskett residence through a lie. Mr. Braskett  
17 claims Fender and Tobey went to the Braskett residence and told  
18 Mrs. Braskett they were there to talk about her safety when, in  
19 fact, they were there to conduct a criminal investigation into  
20 Mr. Braskett's use of drugs. As such, Mr. Braskett claims that  
21 before Mrs. Braskett invited Fender and Tobey into the house, they  
22 lied about the purpose of their visit. Mr. Braskett argues this  
23 was impermissible. During oral argument, Mr. Braskett's counsel  
24 cited the recent case of *Cohen v. Boyle*, slip op., 2012 WL 1292431  
25 (W.D. Wash. Apr. 16, 2012), for the proposition that although  
26 officers may use a ruse to gain entry to a residence in some

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28 <sup>60</sup> Keaney Decl., Ex. 1, B. Braskett Dep, ECF p. 40.

1 circumstances, it is impermissible for officers to gain entry into  
2 a residence by “misrepresenting the scope, nature or purpose of a  
3 government investigation.” *Cohen*, 2012 WL 1292431 at \*9 (quoting  
4 *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990)).<sup>61</sup>

5 *Cohen*, itself, is not on point here, and *Bosse* and other Ninth  
6 Circuit precedents cited by the *Cohen* court would actually support  
7 the defendants’ position – if, in fact, they had employed a ruse to  
8 gain entry into the residence. However, I find no ruse was  
9 employed. The record indicates that at the time Mrs. Braskett  
10 invited Fender and Tobey into the residence on April 13, 2010, she  
11 was aware that one of the subjects about which the officers wanted  
12 to talk to her was the safety of her and her children. The only  
13 “search” on that date involved Mr. Braskett’s gun. On April 14,  
14 2010, Mrs. Braskett was aware the officers were there regarding  
15 prescription pill bottles. She went looking for them. Those were  
16 the only items involved in the “searches” on the 14th.  
17 Mrs. Braskett concedes she knew, in April 2010, that the officers  
18 were at the house regarding Mr. Braskett’s use of prescription  
19 medications. She knew that on either the 13th, or the 14th, or  
20 both. Because she knew it at least by the 14th, there was no ruse.  
21 I find Mrs. Braskett voluntarily consented to the officers’ entry  
22 into the residence on both dates. She was not impermissibly misled  
23 by their statements regarding why they were there. The searches  
24 were not unconstitutional on this basis.

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28 <sup>61</sup> See Oral Argument Tr., July 9, 2012, at 50:13-51:4.

1                                   **42 U.S.C. § 1983 Violations**

2           Section 1983 provides, in relevant part, that “[e]very person  
3 who, under color of any statute, ordinance, regulation, custom, or  
4 usage, of any State . . . subjects, or causes to be subjected, any  
5 citizen of the United States or other person within the  
6 jurisdiction thereof to the deprivation of any rights, privileges,  
7 or immunities secured by the Constitution and laws, shall be liable  
8 to the party injured in an action at law, suit in equity, or other  
9 proper proceeding for redress.”

10          A plaintiff raising a 42 U.S.C. § 1983 claim must show that a  
11 person acting under color of state law deprived him of a  
12 constitutional right. *Dowe v. Total Action Against Poverty*, 145  
13 F.3d 653, 658 (4th Cir. 1998). Section 1983 “is not itself a  
14 source of substantive rights, but merely provides a method for  
15 vindicating federal rights elsewhere conferred. The first step in  
16 any such claim is to identify the specific constitutional right  
17 allegedly infringed.” *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct.  
18 807, 811-812, 127 L. Ed. 2d 114 (1994) (internal citations and  
19 quotation marks omitted).

20  
21                                   **Fourth Amendment Violations**

22          The Fourth Amendment provides that “the right of the people to  
23 be secure in their persons, houses, papers, and effects, against  
24 unreasonable searches and seizures, shall not be violated. . . .”  
25 U.S. Const. Amend. IV.

26          The Fourth Amendment is violated when a search is conducted  
27 without a warrant issued upon probable cause. A warrantless search  
28 is “per se unreasonable. . . subject only to a few specifically

1 established and well-delineated exceptions." *Schneckloth v.*  
2 *Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d  
3 854 (1973).

4 "The prohibition does not apply, however, to situations in  
5 which voluntary consent has been obtained, either from the  
6 individual whose property is searched, or from a third party who  
7 possesses common authority over the premises." *Illinois v.*  
8 *Rodriguez* 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d  
9 148 (1990) (internal citations omitted).

10 Common authority is, of course, not to be  
11 implied from the mere property interest a  
12 third party has in the property. The  
13 authority which justifies the third-party  
14 consent does not rest upon the law of  
15 property, with its attendant historical and  
16 legal refinements but rests rather on mutual  
17 use of the property by persons generally  
having joint access or control for most  
purposes, so that it is reasonable to  
recognize that any of the co-inhabitants has  
the right to permit the inspection in his own  
right and that the others have assumed the  
risk that one of their number might permit the  
common area to be searched.

18 *United States v. Matlock*, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993  
19 n.7, 39 L. Ed. 2d 242(1974) (internal citations omitted).

20 In a § 1983 claim such as this, to avoid summary judgment, a  
21 plaintiff must raise a material issue of fact regarding whether the  
22 person giving consent had common authority over the area searched.  
23 The *Matlock* Court held that "the consent of one who possesses  
24 common authority over premises or effects is valid as against the  
25 absent, nonconsenting person with whom that authority is shared."  
26 *Matlock*, 415 U.S. at 170, 94 S. Ct. at 993.

27 The Ninth Circuit has summarized post-*Matlock* cases as  
28 requiring that "a consent-giver with limited access to the searched

1 property lacks actual authority to consent to a search. . . . The  
2 cases upholding searches generally rely on the consent-giver's  
3 unlimited access to property to sustain the search." *U.S. v. Kim*,  
4 105 F.3d 1579, 1582 (9th Cir. 1997).

5 The Ninth Circuit has upheld a spouse's authority to consent  
6 to police entering a property in which both she and the defendant  
7 lived as co-tenants, finding the consent-giver was a joint-user of  
8 the property, with full access to the property, and as such, could  
9 consent to the police searching the property. *United States v.*  
10 *Guzman*, 852 F.2d 1117, 1121 (9th Cir. 1988). In *United States v.*  
11 *Sealey* 830 F.2d 1028 (9th Cir. 1987), the defendant's spouse  
12 consented to police searching the property. The Ninth Circuit  
13 found the defendant's wife had mutual access to the entire  
14 property, she was part owner of the residence, she was married to  
15 the defendant, and she had full access to all parts of the  
16 residence. The defendant asserted that he retained sole ownership  
17 over sealed containers, to the exclusion of his wife. However, the  
18 Ninth Circuit rejected this assertion because, on the facts, the  
19 defendant had failed to mark the containers in such a way as to  
20 indicate his sole ownership.

### 21 22 **Analysis**

23 In this case, Braskett claims the defendants entered his home,  
24 conducted a search with neither a warrant nor exigent circum-  
25 stances, and removed property from the Braskett residence, all  
26 without his consent. Braskett alleges these actions violated his  
27 right to be free from "unreasonable search and seizure under the  
28

1 Fourth Amendment.”<sup>62</sup> Specifically, Braskett contends that in the  
 2 course of the search, the defendants violated his Fourth Amendment  
 3 rights by searching his medicine cabinet, taking medical records,  
 4 going through the garbage, and retrieving a handgun from the  
 5 dresser. Braskett contends that at the time, Mrs. Braskett was  
 6 incapable of consenting.

7 On or around April 12, 2010, Mrs. Braskett asked Mr. Braskett  
 8 to move out of the family home. Mrs. Braskett remained in the  
 9 house with their two children.<sup>63</sup> On Tuesday, April 13, 2010, Fender  
 10 and Tobey went to the Braskett residence, identified themselves to  
 11 Mrs. Braskett as members of the PPB, and talked with Mrs. Braskett  
 12 at the kitchen table.<sup>64</sup>

13 Mr. and Mrs. Braskett are both on the title to the property.  
 14 They both had unfettered access to the entire house. Neither of  
 15 them, on this record, had ever physically or verbally excluded the  
 16 other from an area within the house.<sup>65</sup> In fact, on the dates in  
 17 question, there is no material issue of fact that Mrs. Braskett had  
 18 “common authority” over all areas of the residence, and thus was  
 19 able to validly consent to the defendants’ search of the residence.

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23 <sup>62</sup> First Amend. Comp. ¶¶ 7 & 8.

24 <sup>63</sup> Ex. 1, R. Braskett Depo. 31:19-23; Ex. 2, B. Braskett Depo.  
 25 69:20-70:24.

26 <sup>64</sup> Ex. 3, Fender Depo. 58:5-7; Ex. 2, B. Braskett Depo. 77:18-  
 27 79:6.

28 <sup>65</sup> Ex. 1, R. Braskett Depo. 70:1-8; 81:2-5; Ex. 2, B. Braskett  
 Depo. 110:13-16; 111:5-8.

1 *I. Removal of gun from master bedroom dresser*

2 While sitting at the kitchen table on April 13, 2010,  
 3 Mrs. Braskett expressed her concern about Mr. Braskett's firearms  
 4 around the house, and the danger they posed should their children  
 5 gain access to them.<sup>66</sup> Mrs. Braskett led Fender and Tobey to the  
 6 master bedroom, informed them that Mr. Braskett had a gun in the  
 7 dresser, and asked them to remove the gun. Tobey entered the  
 8 bedroom and removed the gun.<sup>67</sup> Fender did not enter the dresser to  
 9 remove the gun, and did not touch the gun at any stage.<sup>68</sup> Tobey  
 10 assumed that Mrs. Braskett had access to the dresser.<sup>69</sup>  
 11 Mrs. Braskett allowed Tobey to unload the ammunition from the gun.<sup>70</sup>  
 12 Mrs. Braskett opened the gun safe in the garage. The gun safe had  
 13 a touchpad lock to which Mrs. Braskett knew the combination.<sup>71</sup>  
 14 Tobey placed the gun in the safe in the garage because  
 15 Mrs. Braskett did not want the gun in the house.<sup>72</sup> Neither Fender  
 16 nor Tobey removed the firearm from the Braskett residence at any  
 17 time.

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 19 <sup>66</sup> Ex. 3, Fender Depo. 72:13-16; 75:20-22.

20 <sup>67</sup> Ex. 2, B. Braskett Depo. 97:7-13; Ex. 4, Tobey Depo. 23:20-  
 21 24:5.

22 <sup>68</sup> Fender Decl. ¶3; Ex. 3, Fender Depo. 72:12-21; 73:13-20;  
 23 79:7-12.

24 <sup>69</sup> Ex. 4, Tobey Depo. 27:8-28:6.

25 <sup>70</sup> Ex. 2, B. Braskett Depo. 97:11-16; 156:10-12; Ex. 3, Fender  
 26 Depo. 73:1-4.

27 <sup>71</sup> Ex. 2, B. Braskett Depo. 97:11-24.

28 <sup>72</sup> Ex. 2, B. Braskett Depo. 97:25-98:2; Ex. 4 Tobey Decl.  
 24:13-14.



1 The defendants allege that Fender is entitled to summary  
2 judgment because she, unlike Tobey, did not touch the gun at any  
3 point.<sup>73</sup> One of the reasons Fender and Tobey went to the Braskett  
4 residence was to ensure that Mrs. Braskett and her children were  
5 safe.<sup>74</sup> The removal of the gun from the master bedroom dresser, and  
6 its subsequent placement in the gun safe, was in line with the  
7 purpose of ensuring the safety of Mrs. Braskett and her children.  
8 Both officers were at the residence inquiring about Mrs. Braskett's  
9 safety. It would be an artificial distinction, and contrary to  
10 Fender's announced purpose for being there, to find that Fender was  
11 not involved in the removal of the gun from the master bedroom  
12 dresser. She was present in the Braskett residence when Tobey  
13 moved the gun to ensure the safety of Mrs. Braskett and her  
14 children. Both officers were involved in the safety conversation.

15 However, there are no issues of material fact with respect to  
16 the gun. Mrs. Braskett had common authority over the entire  
17 Braskett residence. She knew the gun was in the dresser, and knew  
18 the combination code for the gun safe. This is consistent with her  
19 having "common authority" over at least those areas associated with  
20 the guns in the house. Tobey only entered the dresser at the  
21 request of and with the consent of Mrs. Braskett. The defendants  
22 are entitled to summary judgment with respect to the gun because  
23 the "search," which defendant does not contest for purposes of this  
24 motion, was done with appropriate consent.

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26 <sup>73</sup> Memo in Supp. of Defs.' Motion Summ. J., 14.

27 <sup>74</sup> Ex. 2, B. Braskett Depo. 77:13-17; Ex. 4, Tobey Depo. 12:20-  
28 25.

1 *II. Search of the medicine cabinet*

2 On April 14, 2010, Fender and Tobey returned to the Braskett  
 3 residence to determine whether Mr. Braskett had his own prescrip-  
 4 tion for painkiller medication.<sup>75</sup> Mrs. Braskett arrived home from  
 5 work, and invited Fender and Tobey inside the Braskett residence.<sup>76</sup>  
 6 Mrs. Braskett went upstairs to retrieve one of Mr. Braskett's  
 7 medication bottles, but she was unable to find one initially  
 8 because Mr. Braskett had been in the house and gotten rid of them.<sup>77</sup>  
 9 Mrs. Braskett obtained prescription bottles from her husband's  
 10 medicine cabinet in the master bathroom and showed them to Fender,  
 11 who wrote information from the labels on a piece of paper, but did  
 12 not remove the bottles from the Braskett residence.<sup>78</sup> Neither  
 13 Fender nor Tobey ever went into either the medicine cabinet or the  
 14 master bathroom on April 14, 2010.<sup>79</sup>

15 The record illustrates that there was no part of the Braskett  
 16 residence from which either spouse was excluded. *Matlock* made the  
 17 point that common authority is not derived from a proprietary  
 18 interest, but rather is based upon the mutual use of the property  
 19 such that "it is reasonable to recognize that any of the co-  
 20 inhabitants has the right to permit the inspection in his own right

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22 <sup>75</sup> Tobey Depo. 34:18-22; Ex. 3, Fender Depo. 101:5-12.

23 <sup>76</sup> Ex. 3, Fender Depo. 101:5-22; Ex. 4, Tobey Depo. 34:22-24;  
 24 Ex. 2, B. Braskett Depo. 100:4-5.

25 <sup>77</sup> Ex. 3, Fender Depo. 102:8-19; Ex. 4, Tobey Depo. 35:3-10.

26 <sup>78</sup> Ex. 2, B. Braskett Depo. 101:8-102-2; 103: 16-104:4.

27 <sup>79</sup> Ex. 2, B. Braskett Depo, 101:8-25; Ex. 3, Fender Depo.  
 28 133:15-21; Tobey Decl. ¶6; Fender Decl. ¶4.

1 and that the others have assumed the risk that one of their number  
2 might permit the common area to be searched." *Matlock*, 415 U.S. at  
3 171 n.7, 94 S. Ct. at 993 n.7.

4 Braskett claims that when he left his medication in the  
5 bathroom, he had a reasonable expectation of privacy, as he did not  
6 expect the PPB to come to his home.<sup>80</sup> The Ninth Circuit considered  
7 the scope of the mutual use doctrine in *United States v. Welch*, 4  
8 F.3d. 761 (9th Cir. 1993). There, McGee and Welch rented a car and  
9 drove to Las Vegas. Both were subsequently arrested. McGee  
10 consented to a search of the car. The Ninth Circuit upheld the  
11 search of the car because both McGee and Welch had joint access to  
12 and mutual use of it, and "by sharing access to and use of the car  
13 with McGee, Welch relinquished, in part, her expectation of privacy  
14 in Fourth Amendment interests in the car." *Welch*, 4 F.3d at 764.  
15 However, the court found Welch did not relinquish her expectation  
16 of privacy in her purse which was in the car. *Id.* "The shared  
17 control of 'host' property does not serve to forfeit the expecta-  
18 tion of privacy in containers within that property." *Id.* (internal  
19 citations and quotation marks omitted).

20 When applied to the instant case, Mr. Braskett apparently  
21 contends that, irrespective of Mrs. Braskett's authority over the  
22 master bathroom and medicine cabinet (i.e., the "host property"),  
23 Mr. Braskett had not necessarily forfeited an expectation of  
24 privacy in the medical records contained therein.<sup>81</sup> Mr. Braskett  
25 considers each of the prescription bottles to constitute a

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27 <sup>80</sup> Oral Arg. Tr., July 9, 2012, at 56:21-57:9.

28 <sup>81</sup> Ex. 1, R. Braskett Depo. 72:16-20.

1 confidential medical record.<sup>82</sup> Here, Mr. Braskett fails to  
 2 substantiate his claim that he had retained a reasonable expecta-  
 3 tion of privacy in the medical information contained on his  
 4 prescription bottles. Rather, than storing his prescription  
 5 bottles exclusively in his medicine cabinet, Mr. Braskett concedes  
 6 that, on occasion, he left his prescription bottles around the  
 7 house.<sup>83</sup> When Mr. Braskett disposed of his prescription bottles,  
 8 he did nothing to destroy the "confidential medical records"  
 9 contained on those bottles.<sup>84</sup> Further, Mr. Braskett has never made  
 10 any effort to exclude Mrs. Braskett from his medicine cabinet.<sup>85</sup>

11 In the instant case, when Mr. Braskett left the prescription  
 12 bottles in the master bathroom and medicine cabinet which  
 13 Mrs. Braskett also had use of, he assumed the risk that  
 14 Mrs. Braskett might permit that area to be searched. Similarly,  
 15 there is nothing in the record to support any effort to exclude  
 16 Mrs. Braskett from the information on the outside of the prescrip-  
 17 tion bottles.

18 On these facts, Fender and Tobey are entitled to summary  
 19 judgment on this issue as a matter of law. Their receipt of the  
 20 information on the outside of the prescription bottles from the  
 21 medicine cabinet was obtained by valid consent.

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 25 <sup>82</sup> Ex. 1, R. Braskett Depo. 72:21-73:1.

26 <sup>83</sup> Ex. 1, R. Braskett Depo. 73:6-11.

27 <sup>84</sup> Ex. 1, R. Braskett Depo. 73:12-24.

28 <sup>85</sup> Ex. 1, R. Braskett Depo. 70:9-12.

1 *III. Search of the garbage can and removal of prescription*  
2 *bottles from the garbage can*

3 The defendants assert that Fender is entitled to summary  
4 judgment because she did not search the garbage can, or remove  
5 anything from the garbage can, whereas Tobey is entitled to summary  
6 judgment because he conducted a search with the consent of  
7 Mrs. Braskett.<sup>86</sup> The defendants made a similar assertion concerning  
8 the removal of the gun from the master bedroom dresser. Both  
9 officers returned to the Braskett residence on April 14, 2010, for  
10 the purpose of obtaining evidence that Mr. Braskett had prescrip-  
11 tions for his medications in his own name. These arguments rise  
12 and fall together. It would be an artificial distinction to say  
13 that Fender was not involved in the search of the garbage can. The  
14 search of the garbage can was in connection with the officers'  
15 joint purpose for being there.

16 Braskett alleges the defendants violated his Fourth Amendment  
17 rights by searching through his garbage can on April 14, 2010. The  
18 record reflects neither who placed the garbage can at the curb, nor  
19 when the garbage can was placed at the curb. However, it appears  
20 it was Mr. Braskett, himself, who removed the prescription bottles  
21 from the computer room and placed them, along with the contents of  
22 the computer room wastebasket, in the garbage can on April 14,  
23 2010. It is unclear from the record exactly when Mr. Braskett put  
24 the prescription bottles in the garbage can. There are two  
25 possibilities. First, Mr. Braskett placed the prescription bottles  
26 in the garbage can in the garage, before the garbage can was taken  
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28 <sup>86</sup> Memo in Supp. of Defs.' Motion Summ. J., 16.

1 out to the curb. Second, Mr. Braskett went to the curb and placed  
2 the prescription bottles in the garbage can which had already been  
3 taken out to the curb. If it was the former, when the garbage can  
4 was in the garage, it was in an area over which Mrs. Braskett had  
5 common authority, and, as such, she could consent to a search of  
6 the garbage can in that area. If it was the latter, Mr. Braskett  
7 had no expectation of privacy in the contents of the garbage can at  
8 the curb for pickup. As Mr. Braskett concedes, once garbage goes  
9 to the curb, the owner has relinquished any privacy interest in its  
10 contents.<sup>87</sup>

11 It is not disputed that Mrs. Braskett opened the garbage can  
12 where Mr. Braskett's prescription bottles were found. There is a  
13 dispute as to who retrieved the bag from the garbage can; however,  
14 that dispute is not material. Even viewing the facts in the light  
15 most favorable to the non-moving party, there would be no violation  
16 of Mr. Braskett's Fourth Amendment rights arising from the  
17 officers' removal of the prescription medication bottles from the  
18 garbage can, as it was done with the consent of Mrs. Braskett.

19 Mr. Braskett has failed to establish the existence of a  
20 genuine issue of material fact for trial. Therefore, the  
21 defendants' motion for summary judgment on this claim is granted.

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27  
28 <sup>87</sup> Ex. 1, R. Braskett Depo. 152:17-20.

1 *IV. Removal of confidential medical information from*  
 2 *prescription bottles*

3 Braskett alleges the defendants violated his Fourth Amendment  
 4 rights by taking medical records. Braskett considers the informa-  
 5 tion contained on his prescription bottles to constitute a medical  
 6 record.<sup>88</sup> It is not clear, but the court assumes he pursues this  
 7 theory with respect to the information on the prescription bottles  
 8 from the medicine cabinet and from the garbage can in the garbage.

9 Braskett admits he did not always keep his prescription  
 10 bottles secure in his medicine cabinet,<sup>89</sup> and he concedes that when  
 11 he disposed of his prescription bottles, he did not attempt to  
 12 remove any of his personal information contained on the bottles.<sup>90</sup>  
 13 The plastic bag containing the empty prescription bottles was in  
 14 the garbage can inside the garage, and perhaps at the curb, as  
 15 well. Mr. Braskett is aware that anybody could have accessed the  
 16 garbage can while it was on the street.<sup>91</sup> Before he discarded the  
 17 prescription bottles, this record shows he left them in at least  
 18 two locations: the computer room and the master bathroom. Wherever  
 19 Mr. Braskett kept his prescription bottles was, on this record, a  
 20 place where Mrs. Braskett had unfettered access to the bottles and  
 21 the information on their labels. As previously discussed, she had  
 22 common authority over both the locations from which prescription  
 23 bottles were retrieved.

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 25 <sup>88</sup> Ex. 1, R. Braskett Depo. 72:21-73:1.

26 <sup>89</sup> Ex. 1, R. Braskett Depo. 73:6-11.

27 <sup>90</sup> Ex. 1, R. Braskett Depo. 73:2-24, 152:9-11.

28 <sup>91</sup> Ex. 1, R. Braskett Depo. 73:2-24; 104:5-105:24; 152:9-11.

1 Mrs. Braskett consented to the removal of the prescription  
2 bottles from the garbage can and from the medicine cabinet, and  
3 therefore, there was no violation of the Fourth Amendment with  
4 respect to the information on the outside of the bottles. The  
5 defendants are entitled to summary judgment here, as well.

6  
7 **CONCLUSION**

8 For the reasons discussed above, The defendants' motion  
9 (Docket No. 30) for summary judgment is **GRANTED**.

10 IT IS SO ORDERED.

11 Dated this 3rd day of August, 2012.

12 /s/ Dennis J. Hubel

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14 Dennis James Hubel  
15 Unites States Magistrate Judge  
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